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20020254

STATE OF NORTH DAKOTA

in the Supreme Court

Supreme Court Case No. 20020254

Burleigh County Case No. 01-C-01894

Valley Honey Company, LLC., Plaintiff/Appellee, and Cross-Appellant

vs.

Rebecca Graves, Defendant,

and,

Larry Young, Defendant/Appellant. and Cross-Appellee

~~vs.~~

~~Valley Honey Company, LLC., Cross/Appellant.~~

Appellant's Appeal Brief

On an appeal of a memorandum opinion, dated July 12, 2002; a findings of fact, conclusions of law, order for judgment, and judgment, dated July 19, 2002, with notice of entry of judgment dated July 23, 2002; and a writ of restitution, dated July 19,

District Judge; Burt L. Riskedahl.

Submitted by: **Larry Young, Appellant,**
c/o 246 700 South 12th Street,
Bismarck,
North Dakota 58504

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Valley Honey Company, LLC.	Plaintiff/Appellee,
vs.	
Rebecca Graves,	Defendant,
vs.	
Larry Young,	Defendant/Appellant,
vs.	
Valley Honey Company, LLC.,	Cross/Appellant.

Certificate of Service

The Undersigned does here certify that on the 9th day of December, 2002, that the following document(s) were filed or served;

Eight: Appellant's Appeal Brief; and eight Appellant's Appeal Appendix

on; Penny Miller, Clerk, Supreme Court of North Dakota, 600 East Boulevard Avenue, Bismarck, North Dakota 58505

also, one copy of the same upon,

Maury C. Thompson, P.O. Box 1771, Bismarck, ND 58502
James J. Coles, P.O. Box 2162, Bismarck, ND 58502

In person, or by placing the said document(s) in addressed and stamped envelope(s) and depositing the same in the United States Mail at Bismarck, North Dakota 58501

Certified by: _____
Larry Young, Appellant,

Table of the Contents

Statement of the Venue

The subject real property is located within the confines of Burleigh County, North Dakota, and the subject recorded instruments, certain quit claim deeds, are recorded at the Recorder's Office in Bismarck, Burleigh County, North Dakota. Appellant Larry Young is a resident of Burleigh County, North Dakota.

Statement of the Jurisdiction

North Dakota Century Code, § 47-19-41 states in part the following;

No action affecting any right, title, interest or lien, to, in or upon real property shall be commenced or maintained or defense or counterclaim asserted or recognized in court on the ground that a recorded instrument was not entitled to be recorded. The record of all instruments whether or not the same were entitled to be recorded shall be deemed valid and sufficient as the legal record thereof.

The jurisdiction for this appeal is conferred upon the North Dakota Supreme Court by the filing of a Notice of Appeal, Dated September 18, 2002, pursuant to provisions of The North Dakota Constitution, Article VI, Section 6; and the North Dakota Rules of Appellate Procedure, Rule 1, et seq.

Statement of the Authorities

Statement of the Issues

First Issue:

Because the findings of fact of the trial court are without adequate evidentiary support, are premised on inadmissible testimony, are erroneous, and the conclusions of the law based thereon are unsound, inconsistent and contrary to the controlling principles of law applicable to the facts, the proceeding must be remanded with instructions to vacate and set aside the judgment and writ of restitution entered into the proceeding.

Statement of the Case

The Affidavit of Larry Young, dated September 17, 2002 (Register of Actions (ROA) 77-78); (Appellants Appendix (App) 38) contains copies of the subject instruments which relate to the chain of title to the applicable real property. According to the instruments, Eugene T. Mastel and Julie Mastel conveyed their interest in the real property on May 18, 1984 to Albert G. Knoefler and Iva Nette Knoefler by warranty deed (App-45).

On February 20, 1998 Albert G. Knoefler and Ivanette Knoefler conveyed their interest in the real property to Valley Honey L.L.C. by warranty deed (App-49-50).

Thereafter, because of questions raised concerning matters related to the title (App-65), Eugene T. Mastel and Julie Mastel executed a quit claim deed to Iva Nette Knoefler and Albert G. Knoefler on July 8, 1998 (App-51).

Necessity of this quit claim deed raises the issue of whether Albert G. Knoefler and Iva Nette Knoefler ever actually possessed title to transfer to Valley Honey L.L.C.

Albert G. Knoefler executed a quit claim deed to Rebecca Graves and Larry Young on October 27, 2000 (App-52), Ray Knoefler executed a quit claim deed to Rebecca Graves and Larry Young on October 27, 2000 (App-53), Catherine Curtis executed a quit claim deed to Rebecca Graves and Larry Young on October 30, 2000 (App-55), Valley

Honey L.L.C., by Clark B. Stott executed a quit claim deed to Rebecca Graves and Larry Young on December 9, 2000 (App-59). These deeds are all recorded at the Burleigh County, North Dakota, Recorder's Office.

Ivanette Knoefler executed a quit claim deed to Rebecca Graves and Larry Young on January 24, 2001 (App-57) . The original of this grant is in the possession of Larry Young.

The (ROA) in case # 08-01-C-01894 shows that a summons and complaint were filed on 06/01/2001 (ROA-1-2) (App-4-8) wherein it was requested of the court that all the subject quit claim deeds be declared invalid, and title to the subject real property be somehow granted to Valley Honey L.L.C.

A Separate Answer and Counterclaim of Defendant Rebecca Graves was filed on 06/07/2001 (ROA 06), and a Separate Answer and Counterclaim by Defendant Larry Young, by and through Attorney Malcolm H. Brown, was filed on 09/20/2001 (ROA-11)(App-9) stating among other issues that their title was paramount and superior.

A trial was conducted at the Burleigh County Courthouse in Bismarck. North Dakota on May 15, 2002. At the beginning of the trial, Defendant/Appellant Larry Young raised the issue of the court's jurisdiction (App-69)(Transcripts (Tr) 4).

The memorandum opinion appears at (ROA-51)(App-13), a findings of fact, conclusions of law, and order for judgment is shown at (ROA-54)(App-18), a judgment is shown at (ROA-55)(App-28), with a writ of restitution at (ROA-56)(App-31) and a notice of entry of judgment at (ROA-60)(App-33). Interestingly, no citations whatsoever appear anywhere in the above referenced documents.

Under recognized principles of law, a warranty deed frequently requires the addition of quit claim deeds from the grantors, but a quit claim deed is absolute and final as to any right, title, interest, or lien of the grantor.

Since the findings were without evidentiary support, were based on incompetent and inadmissible testimony, and contradicted generally well settled questions of law, a Notice of Appeal was filed on 09/18/2002 (ROA-79)(App-66) pursuant to the applicable provisions of The North Dakota Constitution, and the rules of court procedure.

Statement of the Facts

One of the subject quit claim deeds, dated December 9, 2000 was executed, acknowledged, and delivered by Valley Honey L.L.C., by and through its registered president, Clark B. Stott. Allegedly, an attempt was made to place conditions on this grant. Any condition would be in direct contravention of N.D.C.C., §§ 9-06-07; and 47-09-07, as held in Gajewski v. Bratcher, 221 N.W. 2d 614 (N.D. 1974).

N.D.C.C., § 47-19-41 precludes any action affecting any right, title, interest, or lien on the ground that the recorded instrument was not entitled to be recorded.

The North Dakota Supreme Court has previously held where plaintiffs are suing to quiet title to realty, they must rely upon the strength of their own title and not the weakness of the adversary, if they are to prevail.

Valley Honey L.L.C., commenced this instant action after all its right, title, interest, or lien to the subject realty had been quit claimed to the Defendants.

This clearly was an action without a legal venue, with no basis for lawful court jurisdiction, and the opinion, judgment, and writ of restitution were in contradiction and contravention of statutory law, and generally well settled questions of fact and law, and must be set aside for those reasons.

Request for oral argument

The named Plaintiff, and the Appellant in this instant appeal, Larry Young, requests that this appeal be set for oral argument, pursuant to the provisions of the North Dakota Rules of Appellate Procedure, Rule 34.

Summary of the Argument

Summary of the Argument

The North Dakota Legislature has encoded certain statutes of law concerning the conditions related to instruments of interest, rights, and title transferring those interests, rights, and title to realty. Certain of these statutes may be found at the North Dakota Century Code (N.D.C.C.) §§ 9-06 et seq.; 47-09 et seq.; 47-10 et seq.; and 47-19 et seq.

The statutes make the execution, acknowledgement, and delivery of a quit claim deed to realty absolute, incapable of redelivery, not to be repudiated by the grantor, and beyond the power of a court to nullify or void.

These issues are all fully discussed and addressed in numerous North Dakota Supreme Court cases, and culminate in the findings of Bolyea v. First Presbyterian Church of Wilton, N.D., 196 N.W. 2d 149 (N.D. 1972); and Gajewski v. Bratcher, 221 N.W. 2d 614 (N.D. 1974) which reviewed almost identical issues as are present in this proceeding.

Testimony of Clark B. Stott was incompetent and inadmissible to allege that the subject quit claim deed was delivered only upon certain conditions, and any allegation that a condition could be attached to the quit claim deed was incompetent and inadmissible, because, by statute, delivery of a grant cannot be made conditionally. NDCC § 9-06-07, and § 47-09-07.

Argument; and the Law

The quit claim deed

On December 9, 2000 Valley Honey L.L.C., an alleged North Dakota corporation, by and through its registered president, Clark B. Stott (App-64), executed, acknowledged, and relinquished possession of its right, title, interest, and lien as grantor, under the provisions of N.D.C.C. 47-19-34, to the grantees, Rebecca Graves, and Larry Young by a quit claim deed (App-59) the following real property:

> The Southwest Quarter of the Northwest Quarter of the Southwest Quarter ($SW\frac{1}{4}NW\frac{1}{4}SW\frac{1}{4}$) of Section Fifteen (15), Township 140 North, Range 80 West of the 5th Principal Meridian, (10 acres more or less).
>
> The Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$) Less the Southwest Quarter of the Northwest Quarter of the South west ($SW\frac{1}{4}NW\frac{1}{4}SW\frac{1}{4}$) of Section Fifteen (15), Township 140 North, Range 80 West of the 5th Principal Meridian (30 acres more or less).

The quit claim deed was allegedly subsequently delivered to a third party by Clark B. Stott, with alleged written and oral conditions attached thereto.

When the grantor shows that he parts with all control of the deed and leaves it with a third person as the agent of the grantee, the delivery is effected. Actual delivery of grant into possession of grantee is unnecessary to constitute delivery, if deed is delivered to third person for benefit of grantee and grantee's assent is shown or may be presumed.; McGuigan v. Heuer, et al., 268 N.W. 679 (N.D. 1936).

On December 11, 2000 the subject quit claim deed was duly recorded at the Burleigh County, North Dakota, Recorder's office (App-63).

Thereafter, a civil action was commenced by Valley Honey L.L.C., against the named grantees of the deed, alleging in part repudiation of the deed, unspecified fraud, and that the deed was not entitled to be recorded until certain conditions were met.

After a trial, the court issued a memorandum opinion, a findings of fact and conclusions of law, a judgment, and a writ of restitution, alleging passing title back to Valley Honey L.L.C., without recitation of any case, citation, code, law, regulation, rule, or statute to give the finding any binding or legal effect. This appeal follows.

First Issue:

> Because the findings of fact of the trial court are without adequate evidentiary support, are premised on inadmissible testimony, are erroneous, and the conclusions of the law based thereon are unsound, inconsistent and contrary to the controlling principles of law applicable to the facts, the proceeding must be remanded with instructions to vacate and set aside the judgment and writ of restitution entered into the proceeding.

The trial court claims to have placed its findings in part on the testimony of "Clark Stott" (App-23) and the finding that the quit claim deed was "in actuality not a deed, but rather a conditional contract which would

result in a conveyance of property only if a series of conditions were met, none of which have apparently been met, according to the record of this proceeding." (App-24-25). The alleged findings fly directly into the face of statutory and case-law on the issues.

The North Dakota Supreme Court, Grimson, J. has previously held that evidence sustained finding that there had been an irrevocable delivery of deed;

Where an absolute deposit of a deed with third party is made by grantor without power being retained on part of grantor to recall or control the deed, and with instructions to deliver to grantee, title passes to grantee, and it is beyond power of grantor to divest title of grantee by regaining possession of deed or by destruction of deed. N.D.C.C. § 47-09-09, § 47-09-10.

Statements of a grantor, made after delivery of deed, are admissible in suit to enforce title thereunder, when such statements support the deed, but not when they are against it.; Silbernagel v. Silbernagel, 55 N.W. 2d 713 (N.D. 1952) The North Dakota Supreme Court, speaking through Judge Corliss, lays down the rule as follows: "it is now a thoroughly established rule that, if the grantor parts with all control over the deed at the time of its delivery to the third person, the delivery is good, and the title passes to the grantee," Silbernagel, supra

"A delivery of a deed passes title, and such title is thereafter as much beyond the control of the grantor as though he had never owned the land." (Citing cases) See also 26 C.J.S., Deeds, § 43c, page 244.

A grant takes effect so as to vest the interest intended to be transferred on its delivery by the grantor. N.D.C.C. § 47-09-06, 47-09-07. The delivery of a deed which has been knowingly executed with the intention of transferring title completes the transaction so far as the title is concerned, and vests title in the grantee. Nord v. Nord, 282 NW 507 (N.D. 1938).

If the grantor makes a manual delivery to the grantee of a deed absolute in form, intending to part with all authority and dominion over the instrument, the delivery is absolute and title passes immediately in accordance with the terms of the deed, notwithstanding any intention or understanding to the contrary between the parties. N.D.C.C. § 47-09-07.

A grant cannot be delivered conditionally but delivery to the grantee is necessarily absolute and the instrument takes effect on delivery, discharged of any condition on which delivery was made. N.D.C.C. § 47-09-07. Where a deed has been delivered to the grantee in a manner to divest the grantor of title, subsequent declarations of the grantor tending to impeach the deed are inadmissible.

The trial court sustained the objection on the ground that statements of a grantor are admissible when such statements are in support of a deed, but not when they are against it.; Bolyea v. First Presbyterian Church of Wilton, N.D., 196 N.W. 2d 149 (N.D. 1972)

Testimony of grantors of quitclaim deed was incompetent and inadmissible to prove that the quitclaim deed was delivered only under certain conditions.; N.D.C.C., § 9-06-07.

Any testimony submitted by the plaintiff, Valley Honey L.L.C., or its grantor or agent, Clark B. Stott would have only been admissible or competent into this proceeding if they were in support of the quit claim deed.

Statute providing that execution of a contract in writing, whether required by law to be written or not, supercedes all oral negotiations or stipulation concerning its matter which preceded or accompanied execution of the instrument, is a legislative enactment, in part, of the parol evidence rule.; N.D.C.C., § 9-06-07.

Testimony of grantors to the effect that they delivered the quitclaim deed to the grantees on condition that it was to be returned to them upon the payment of the debt secured thereby was incompetent and inadmissible under the parol evidence rule because, by statute, delivery of a grant cannot be made conditionally. N.D.C.C. § 9-06-07, 47-09-07.

Every grant of an estate in real property is conclusive against the grantor and every one subsequently claiming under him. The grant contained in quitclaim deed was conclusive against the grantors and their privies, and they are precluded from repudiating their agreement and denying the validity thereof.; N.D.C.C., § 47-10-08.

In order to set aside deed, grantors must prove by evidence that is clear, satisfactory and convincing that a mistake was made and that it was mutual. "A grant cannot be delivered to the grantee conditionally. Delivery to him or his agent as such is necessarily absolute and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.; N.D.C.C., § 47-09-07; Arhart v. Thompson, 26 N.W. 2d 523 (N.D. 1947); Adams v. Little Missouri Minerals Association, 143 N.W. 2d 659 (N.D. 1966); Gajewski v. Bratcher, 221 N.W. 2d 614 (N.D. 1974).

No allegations of mistake were raised by the plaintiff in this instant proceeding, and no evidence, grounds, or testimony existed which would legally allow the setting aside of the subject deed.

A "quitclaim deed" contains no covenant of warranty and purports to convey and is understood to convey nothing more than the estate or interest in the property described of which the grantor is seized or possessed, if any, at

the time, rather than the property itself. N.D.C.C., § 47-10-19; Frandson v. Casey, 73 N.W. 2d 436 (N.D. 1955)

Parol evidence rule forbidding evidence of oral agreements relating to subject matter of written contract and adding to or varying the contract is a rule of substantive law and not an evidentiary or interpretive rule.; N.D.C.C., § 9-06-07; Hanes v. Mitchell, 49 N.W. 2d 606 (N.D. 1951).

It is the duty of every contracting party to learn and know the contents of the contract before he signs and delivers it. He owes this duty to the other party of the contract, because the latter may, and probably will, pay his money and shape his action in reliance upon the agreement. The purpose of the rule is to give stability to written agreements and instruments and to remove the temptation and possibility of perjury, which would be afforded if parol evidence were admissible."; 12 Am.Jur., Contracts, § 137. Hanes, supra "A person cannot sign a paper, and then throw upon the courts the burden of protecting him from the consequences of his imprudence. The policy of the law is fixed to the effect that he who will not reasonably guard his own interests when he has reasonable opportunity to do so, and there is no circumstance reasonably calculated to deter him from improving such opportunity, must take the consequences.".

Courts do not exist for the purpose of protecting persons who fail in that regard. The rulings of the trial court in rejecting parol evidence of the prior oral agreement is in accord with the decisions of this court and with general authority. No error was committed. The order and judgment appealed from are affirmed.; N.D.C.C., § 9-03-13, Hanes, supra

Possessor's legal or equitable property interest is superior to interest of subsequent purchaser or judgment creditor who has notice, actual or constructive, of possessor's interest in property. The general rule is that contracts for the sale of real property and transfers of real property interests must be made by an instrument in writing.; N.D.C.C., § 9-06-04; N.D.C.C., § 47-19-01; Williston Co-op. Credit Union v. Fossum, 459 N.W. 2d 548 (N.D. 1990).

Grant in quitclaim deed is conclusive against the grantors and their privies, and they are precluded from repudiating their agreement and denying the validity of their deed.; Gajewski v. Bratcher, 221 N.W. 2d 614 (N.D. 1974).

By law, the plaintiff in this proceeding was barred from commencing the action, or repudiating or denying the validity of the subject quit claim deed.

Summation of the Argument

It is the plain duty of a court to interpret the quit claim deed, dated December 9, 2000 involved herein in the light of the law in existence at the time of its execution and delivery, which must be read into and become an enforceable part thereof, and when so interpreted it is found and determined that the parties agreed that the quit claim deed expressed the true intention of Valley Honey Company, LLC, by and through Clark B. Stott and they cannot adduce or rely upon extrinsic evidence to vary, contradict or impeach it, and having so executed said quit claim deed, they are bound thereby and cannot be permitted to repudiate or violate the material terms and conditions thereof.

Manifestly, to permit either of the parties to breach or to dishonor the written quit claim deed would not only destroy the value of quit claim deeds, but would seriously undermine and impair the stability and security of titles to real property, evidenced by written instruments, and thereby defeat the very purpose of the parol evidence rule, nullify the legislative enactment thereof, and induce the commission of perjury,

Where a deed has been executed to the grantee in a manner to divest the grantor of title, subsequent declarations of the grantor to impeach the deed are inadmissible.

Conclusion

The Appellant in this action, Larry Young, requests the proceeding be remanded and reversed with instructions that because the law states that a grant to a grantee is absolute and cannot be made conditionally, the subject quit claim deeds are absolute and all the rights, title, and interest of the grantors therein to the subject real property have been delivered to Rebecca Graves; and Larry Young; the judgment entered into the proceeding be vacated and set aside and be ordered discharged from the record; that a judgment be awarded to the Defendants for the repayment of money paid on the judgment, with twelve per cent annual interest until fully repaid; and for a judgment to be awarded to Larry Young to cover the costs, expenses, and fees incurred in the proceeding; and for any further relief necessary.

Dated this 7th day of December, 2002.

Submitted by: Larry Young

Larry Young, Appellant,
c/o 246 700 South 12th Street,
Bismarck,
North Dakota 58504

STATE OF NORTH DAKOTA

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vs.	
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and,	
Larry Young,	Defendant/Appellant,
vs.	
Valley Honey Company, LLC.	Cross/Appellant.

Appellant's Appeal Brief Addendum

9-06-05. Contracts unenforceable unless in writing — Statute of frauds.—Repealed by S. L. 1965, ch. 296, § 32.

Note.

For present provision, see §§ 41-02-08, 41-02-16.

9-06-06. Auction sale—Auctioneer memorandum sufficient.—When a sale of any goods or choses in action is made by auction, an entry by the auctioneer in his sale book at the time of the sale of the kind of property sold, the terms of sale, the price, and names of the purchaser and person on whose account the sale is made is a sufficient memorandum.

Source: R. C. 1943, § 9-0606.

7 Am. Jur. 2d, Auctions, § 34.
37 C. J. S. Frauds, Statute of, § 211.

Collateral References.

Frauds, Statute of⇐116(7).

9-06-07. Written contract supersedes oral negotiations.—The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

Source: Civ. C. 1877, § 921; R. C. 1895, § 3888; R. C. 1899, § 3888; R. C. 1905, § 5333; C. L. 1913, § 5889; R. C. 1943, § 9-0607.

Derivation: Cal. Civ. C., 1625.

Application of Rule.

This rule can have no application until a written contract or agreement is established. Foot, Schulze & Co. v. Skeffington, 52 ND 307, 202 NW 642.

A written contract supersedes all prior or contemporaneous oral agreements or conditions concerning the subject matter of the contract, even though the contract is not required to be in writing. Jensen v. Siegfried, 66 ND 222, 263 NW 715.

Under this section, execution of written contract, whether law required it to be written or not, supersedes all preceding or accompanying oral negotiations or stipulations concerning subject matter of contract. Rieger v. Rieger, 175 NW 2d 563.

Application of Rule, Legislative Enactment.

This section is a legislative enactment, in part, of the parol evidence rule. Hanes v. Mitchell, 78 ND 341, 49 NW 2d 606.

Application of Rule, Parties to Contract.

The rule prohibiting the introduction of parol testimony to vary the terms of the contract applies only to a party thereto and not to one who is neither a party to the contract nor a privy to one who is. Roberts v. First Nat. Bank of Fargo, 8 ND 474, 79 NW 993.

Application of Rule, Specific Matters.

The rule that a written contract supersedes all prior and contemporaneous negotiations and stipulations between the parties applies only to the specific matter embraced in the contract. Grand Forks Lbr. & Coal Co. v. Tourtelot, 7 ND 587, 75 NW 901.

Application of Rule, Substantive Law.

The statutory rule that a written contract supersedes oral negotiations is positive substantive law. Allgood v. National Life Ins. Co., 61 ND 763, 240 NW 874.

The so-called parol evidence rule is neither a rule of evidence nor of interpretation, but rather one of substantive law. Hanes v. Mitchell, 78 ND 341, 49 NW 2d 606; Northwestern Equipment, Inc. v. Tentis, 74 NW 2d 832.

Grant.

A transfer, as applied to real estate, is termed a grant. North Dakota Horse & Cattle Co. v. Serumgard, 17 ND 466, 117 NW 453, 29 LRA (NS) 508, 138 Am St Rep 717.

The assignment of an oil and gas royalty in writing is a grant. Corbett v. La Bere, 68 NW 2d 211.

47-09-06. Delivery of written transfer—Requirement—Presumption from execution.—A grant takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor and is presumed to have been delivered at its date.

Source: Civ. C. 1877, §§ 606, 607; R. C. 1895, §§ 3515, 3516; R. C. 1899, §§ 3515, 3516; R. C. 1905, §§ 4952, 4953; C. L. 1913, §§ 5495, 5496; R. C. 1943, § 47-0906.

Derivation: Cal. Civ. C., 1054, 1055.

Burden of Proof.

The burden is upon the grantee to prove delivery. Black v. Black, 58 ND 501, 226 NW 485, 65 ALR 852.

Delivery Required.

No title passes under a deed unless there is either an actual or constructive delivery thereof. McManus v. Commow, 10 ND 340, 87 NW 8.

A deed is of no effect unless it is delivered. Eide v. Tveter, 143 FSupp 665.

Failure to Record.

Where a delivery of a deed is made unconditionally, the fact that the deed was not recorded until after death of the grantor does not affect the title. McGuigan v. Heuer, 66 ND 710, 268 NW 679.

Incomplete Deed.

A deed delivered with the name of the grantee blank, and with no proper authorization shown to fill in the grantee's name, is void on its face. Brugman v. Charlson, 44 ND 114, 171 NW 882, 4 ALR 400.

Intention of Grantor.

Whether there was a delivery of a deed depends upon the intention of the grantor. McGuigan v. Heuer, 66 ND 710, 268 NW 679.

Words or conduct of the grantor evidencing his intention to render his deed presently operative and effectual so as to vest the estate in the grantee, and to surrender control over the title are necessary and sufficient to constitute a valid delivery. Eide v. Tveter, 143 FSupp 665.

Leasehold Interest.

Since an oil and gas lease is a transfer of an interest in real estate, an assignment of such lease also is a transfer of an interest in real estate and takes effect only on its delivery. Mar Win Development Co. v. Wilson, 104 NW 2d 369.

Presumption of Delivery.

It is presumed that a deed was delivered to the grantee on the day of its date and its date is presumed to be the true date. Leonard v. Fleming, 13 ND 629, 102 NW 308, distinguished in 46 ND 631, 180 NW 708; McMillen v. Chamberland, 71 ND 65, 298 NW 767.

Clear and convincing evidence must be produced to rebut the presumption of the delivery of a deed to or ownership of an instrument by a grantee in whose possession the deed is retained. Cox v. McLean, 66 ND 696, 268 NW 686.

The execution and recording of a deed creates a presumption of sufficient delivery and fixes the time when the deed becomes effective. Eide v. Tveter, 143 FSupp 665.

Quitclaim Deed.

Grantors' physically handing quitclaim deed to grantee in attorney's office effected absolute delivery of deed, passing title immediately in accordance with the terms of the deed. Bolyea v. First Presbyterian Church of Wilton, N. D., 196 NW 2d 149, 55 ALR 2d 1304.

Vesting of Title.

The delivery of a deed which has been knowingly executed with the intention of

transferring title completes the transaction so far as the title is concerned, and vests title in the grantee. Nord v. Nord, 68 ND 560, 282 NW 507.

Collateral References.

Deeds⇨54; Sales⇨30.

23 Am. Jur. 2d, Deeds, §§ 79, 80.

26 C. J. S. Deeds, § 40; 77 C. J. S. Sales, § 64.

47-09-07. Delivery must be absolute—Conditional delivery ineffective, becomes absolute.—A grant cannot be delivered to the grantee conditionally. Delivery to him or to his agent as such is necessarily absolute and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.

Source: Civ. C. 1877, § 608; R. C. 1895, § 3517; R. C. 1899, § 3517; R. C. 1905, § 4954; C. L. 1913, § 5497; R. C. 1943, § 47-0907.

Derivation: Cal. Civ. C., 1056.

Acknowledgment of Instrument.

To make transfer of real property by a deed valid as between the grantor and grantee, it is not necessary that the instrument be acknowledged. Bumann v. Burleigh County, 73 ND 655, 18 NW 2d 10.

Condition Precedent in Written Contract for Sale Void.

Title to mineral rights was transferred to the grantee as of the date of the manual delivery by the grantor and manual acceptance by the grantee of the mineral deeds notwithstanding provisions in the contract for sale providing that grantee was not to issue the consideration for such conveyance until he was satisfied that grantor's title was acceptable, and that grantee would not claim ownership of the mineral interests until after such consideration (in the form of corporate stock) had been issued to grantor. Adams v. Little Missouri Minerals Assn., 143 NW 2d 659.

Mortgage.

A mortgage takes effect on its delivery free from any condition upon which the delivery was made. Sargent v. Cooley, 12 ND 1, 94 NW 576.

Rebuttal of Presumption.

Clear and convincing evidence must be produced to rebut the presumption of the delivery of a deed to or ownership of an instrument by a grantee in whose possession the deed is retained. Cox v. McLean, 66 ND 696, 268 NW 686.

Return of Deed.

If a deed has once been delivered, its return to the grantor for safekeeping or some other specific purpose does not destroy the effect of the delivery. Keefe v. Fitzgerald, 69 ND 481, 288 NW 213.

Sufficiency of Delivery.

Where plaintiffs executed deed and placed it in the hands of agent of defendant for delivery pursuant to an agreement that agent should have the right to demand from his principal as a condition precedent to such delivery, that the principal should procure a deed to the agent for other land, plaintiff's deed, having been delivered to defendant without the performance of such condition precedent, passed title, as it was incompetent for the agent to make any agreement securing a benefit for himself adverse to his employers' interests. Holt v. Colten, 4 Dak 67, 22 NW 495.

If the grantor makes a manual delivery to the grantee of a deed absolute in form, intending to part with all authority and dominion over the instrument, the delivery is absolute and title passes immediately in accordance with the terms of the deed, notwithstanding any intention or understanding to the contrary between the parties. Ueland v. More Bros., 22 ND 283, 133 NW 543; Anderson v. Overby, 46 ND 631, 180 NW 708; Nord v. Nord, 68 ND 560, 282 NW 507; Keefe v. Fitzgerald, 69 ND 481, 288 NW 213; McMillen v. Chamberland, 71 ND 65, 298 NW 767; Arhart v. Thompson, 75 ND 189, 26 NW 2d 523; Shuck v. Shuck, 77 ND 628, 44 NW 2d 767; Accola v. Miller, 76 NW 2d 517.

Where a grantee does not record a deed nor take possession of the land until after the decease of the grantor, and there is evidence that she had in mind

Collateral References.

Escrows⇨1-10.

23 Am. Jur. 2d, Deeds, § 92; 28 Am. Jur. 2d, Escrow, §§ 1-27.

30 C. J. S. Escrows, §§ 1-10.

Tender of deed placed in escrow as condition precedent to action for purchase price, 35 ALR 130.

Unauthorized delivery or fraudulent procurement of escrow as affecting title or interest in property, 48 ALR 405; 54 ALR 1246.

Interpleader: escrow holder's right to interplead rival claimants, 60 ALR 638.

Cloud on title, deed in escrow as, 78 ALR 77.

Rights and remedies where depositary fails or refuses to deliver instrument or property placed in escrow, notwithstanding performance of conditions of delivery, 95 ALR 293.

Time of performance of, or offer to perform, conditions upon which delivery was to be made, as affecting duty and liability of escrow holder, 107 ALR 948.

Relation back of title or interest embraced in escrow agreement upon final delivery or performance of condition, 117 ALR 69.

Signature of another as grantor, delivery of deed as condition on obtaining, 140 ALR 265.

Quitclaim deed as conveying interest under escrow agreement, 162 ALR 566.

Loss resulting from defaults or peculations of escrow holder, who must bear, 15 ALR 2d 870.

Interest: rights as between vendor and vendee under land contract in respect of interest as affected by deposit in escrow, 25 ALR 2d 975.

Mortgage payments: rights in funds representing "escrow" payments made by mortgagor in advance to cover taxes or insurance, 50 ALR 3d 697.

47-09-09. Constructive delivery.—Though a grant is not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

1. When, by the agreement of the parties, the instrument is understood to be delivered at the time of execution and the circumstances are such that the grantee is entitled to immediate delivery; or
2. When it is delivered to a stranger for the benefit of a grantee and his assent is shown or may be presumed.

Source: Civ. C. 1877, § 611; R. C. 1895, § 3520; R. C. 1899, § 3520; R. C. 1905, § 4957; C. L. 1913, § 5500; R. C. 1943, § 47-0909.

Derivation: Cal. Civ. C., 1059.

Acceptance by Minor.

In order to have valid constructive delivery of a deed to a minor, there must be an agreement between the grantor and the guardian of the minor so as to entitle the grantee to an immediate delivery. McManus v. Commow, 10 ND 340, 87 NW 8; Shuck v. Shuck, 77 ND 628, 44 NW 2d 767.

Burden of Proof.

A grantee who asserts title has the burden of proving a constructive delivery. Magoffin v. Watros, 45 ND 406, 178 NW 134; Black v. Black, 58 ND 501, 226 NW 485, 65 ALR 852.

Date of Acceptance.

If the grantee in a deed, after learning that the deed had been delivered to a stranger for his benefit, accepts the same, such acceptance relates back to the time of the original delivery. Arnegaard v. Arnegaard, 7 ND 475, 75 NW 797, 41 LRA 258, distinguished in 19 ND 713, 125 NW 307.

Delivery to Agent.

When the grantor shows that he parts with all control of the deed and leaves it with a third person as the agent of the grantee, the delivery is effected. McGuigan v. Heuer, 66 ND 710, 268 NW 679.

Insufficient Delivery.

A deed left among other papers, with a letter showing an intention that the land described should go to the grantee on the death of the grantor, is not a con-

structive delivery. Black v. Black, 58 ND 501, 226 NW 485, 65 ALR 852.

Intention of Grantor.

An indispensable element to be considered in determining whether a deed has been delivered is the intention of the grantor. Stark County v. Koch, 107 NW 2d 701, 705.

Where there was no evidence grantor intended to part with dominion and control of deeds in favor of grantees or to vest title to property in grantees there was no constructive delivery under this section. Frederick v. Frederick, 178 NW 2d 834.

Life Estate in Grantor.

If a deed is delivered to a third person to be delivered to the grantee on the death of the grantor, such delivery transfers the title to the grantee, subject to the life interest of the grantor in the land. Arnegaard v. Arnegaard, 7 ND 475, 75 NW 797, 41 LRA 258, distinguished in 19 ND 713, 125 NW 307; Silbernagel v. Silbernagel, 79 ND 275, 55 NW 2d 713.

Question of Fact.

The question of constructive delivery of deeds to grantee named therein was a question of fact where the deeds were executed by grantee's mother and left with bank with a statement that the grantor wanted the deeds recorded if anything happened to her. Magoffin v. Watros, 45 ND 406, 178 NW 134.

Collateral References.

Deeds⇐54-67.
23 Am. Jur. 2d, Deeds, §§ 78-135.
26 C. J. S. Deeds, §§ 40-53.

Sufficiency of delivery of deed where grantor retains, or recovers, physical possession, 87 ALR 2d 787.

47-09-10. Redelivery does not retransfer.—Redelivering a grant of real property to the grantor, or canceling it, does not operate to retransfer the title.

Source: Civ. C. 1877, § 610; R. C. 1895, § 3519; R. C. 1899, § 3519; R. C. 1905, § 4956; C. L. 1913, § 5499; R. C. 1943, § 47-0910.

Derivation: Cal. Civ. C., 1058.

Destruction or Redelivery.

The destruction of an unrecorded but delivered deed does not divest the title of the grantee and revest it in the grantor. Russell v. Meyer, 7 ND 335, 75 NW 262, 47 LRA 637.

Where a grantor has deposited a deed with a third person to be delivered to the grantee after the death of the grantor, he cannot subsequently, by withdrawing or destroying the deed, affect a delivery thus completed. Silbernagel v. Silbernagel, 79 ND 275, 55 NW 2d 713.

Redelivering a deed of real property to the grantor does not operate to retransfer the legal title, nor is such retransfer effected by the destruction of the redelivered deed by the grantor. Kuntz v. Partridge, 65 NW 2d 681, 52 ALR 2d 1.

Immediate return of deed to the grantor may be considered as a circumstance bearing upon the question of whether or not the deed was delivered. Eide v. Tveter, 143 FSupp 665.

Collateral References.

Deeds⇐178, 179, 181.
23 Am. Jur. 2d, Deeds, §§ 87, 310.
26 C. J. S. Deeds, §§ 173-175.

47-09-11. Interpretation of grants.—Grants shall be interpreted in like manner with contracts in general except so far as is otherwise provided by this chapter. If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction, and if several parts of a grant are absolutely irreconcilable, the former part shall prevail. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.

Source: Civ. C. 1877, §§ 612 to 614, 616; R. C. 1895, §§ 3521 to 3523, 3525; R. C. 1899, §§ 3521 to 3523, 3525; R. C. 1905, §§ 4958 to 4960, 4962; C. L. 1913,

47-10-01. Method of transfer. An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law or by an instrument in writing, subscribed by the party disposing of the same or by the party's agent thereunto authorized by writing. This does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof.

Source: Civ. C. 1877, §§ 622, 993; R.C. 1895, §§ 3531, 3960; R.C. 1899, §§ 3531, 3960; R.C. 1905, §§ 4968, 5407; C.L. 1913, §§ 5511, 5963; R.C. 1943, § 47-1001.

Derivation: Cal. Civ. C., 1091, 1741.

Cross-References.

Contracts required to be in writing, see § 9-06-04.

Minor's disability to contract relating to real property, see § 14-10-09.

Mortgage of real property, see ch. 35-03.

Transfer by corporation, see § 10-19.1-26, and 47-10-05.1.

Transfer by nonprofit corporation, see § 10-33-21.

Acknowledgment.

To make a transfer of real property by a deed valid as between the grantor and the grantee, it is not necessary that the instrument be acknowledged. Bumann v. Burleigh County, 73 N.D. 655, 18 N.W.2d 10 (1944).

As between the parties, the fact that the deed is not acknowledged does not prevent it from operating as a transfer of real estate. Knoshaug v. Pollman, 148 F. Supp. 16 (D.N.D.), aff'd, 245 F.2d 271 (8th Cir. 1957).

Brokerage Contract.

A mere brokerage contract, whereby real estate broker was to receive all over a certain sum in case he found a purchaser for property, was not a contract for the sale of the property in contravention of this section. Kepner v. Ford, 16 N.D. 50, 111 N.W. 619 (1907).

Buildings.

An agreement for the sale of a large, frame livery barn, affixed to and a part of the real estate, the barn to be wrecked and the lumber removed thereafter at the convenience of the purchaser, was a contract for the sale of an interest in real property and could not be enforced unless made in writing. Baird v. Elliott, 63 N.D. 738, 249 N.W. 894, 91 A.L.R. 1274 (1933).

Contract by Agent.

A contract of an agent to sell property is void in the absence of written authority signed by the owner. Ballou v. Bergvendsen, 9 N.D. 285, 83 N.W. 10 (1900).

To make valid a written contract for the sale of real property signed by an agent of the vendor, the agent must have authority in writing from the owner so to do. Brandrup v. Britten, 11 N.D. 376, 92 N.W. 453 (1902).

The statute of frauds deals with contracts necessarily affecting the title and conveyance of real estate as between the parties to the contract and does not include a contract of agency whereby the agent is to bid in real estate in the name of the principal. Schmidt v. Beiseker, 14 N.D. 587, 105 N.W. 1102, 5 L.R.A. (n.s.) 123, 116 Am. St. Rep. 706 (1905).

A contract for the conveyance of land, executed by the party to be charged may be enforced even though the authority of the agent of the vendee who signed the contract was not given in writing. Merritt v. Adams County Land & Inv. Co., 29 N.D. 496, 151 N.W. 11 (1915), distinguished, Baird v. Elliott, 63 N.D. 738, 249 N.W. 894, 91 A.L.R. 1274 (1933).

A written contract for the sale of land, entered into by an agent of the vendor who has only a parol authority to contract for the sale thereof, is void. Halland v. Johnson, 42 N.D. 360, 174 N.W. 874 (1919).

This statute applies to sales of privately-owned real estate at public auction, but the

47-10-08. Grant conclusive against whom.—Every grant of an estate in real property is conclusive against the grantor and every one subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that first is duly recorded.

Source: Civ. C. 1877, § 629; R. C. 1895, § 3540; R. C. 1899, § 3540; R. C. 1905, § 4977; C. L. 1913, § 5522; R. C. 1943, § 47-1008.

Derivation: Cal. Civ. C., 1107.

Quitclaim Deed.

Grant in quitclaim deed is conclusive against the grantors and their privies, and they are precluded from repudiating their agreement and denying the validity of their deed. Gajewski v. Bratcher, 221 NW 2d 614.

Collateral References.

Deeds⇐102-105; Vendor and Purchaser⇐220, 221.

23 Am. Jur. 2d, Deeds, §§ 282, 289, 292, 294; 77 Am. Jur. 2d, Vendor and Purchaser, § 633.

26 C. J. S. Deeds, §§ 97-99; 92 C. J. S. Vendor and Purchaser, § 320.

47-10-09. Grant valid pro tanto.—A grant made by the owner of an estate for life or years, purporting to transfer a greater estate than he could transfer lawfully, does not work a forfeiture of his estate but passes to the grantee all the estate which the grantor could lawfully transfer.

Source: Civ. C. 1877, § 630; R. C. 1895, § 3541; R. C. 1899, § 3541; R. C. 1905, § 4978; C. L. 1913, § 5523; R. C. 1943, § 47-1009.

Derivation: Cal. Civ. C., 1108.

47-10-10. Title to highway, street, alley, and public right of way—Vacation.—A transfer of land bounded by a highway, street, alley, or public right of way passes the title of the person whose estate is transferred to the soil of the highway, street, alley, or public right of way in front to the center thereof unless a different intent appears from the grant. Every conveyance of real estate, which abuts upon a vacated highway, street, alley, or other public right of way, shall be construed, unless a contrary intent appears, to include that part of such highway, street, alley or public right of way which attaches either by operation or presumption of law, to such abutting real estate upon such vacation.

Source: Civ. C. 1877, § 631; R. C. 1895, § 3542; R. C. 1899, § 3542; R. C. 1905, § 4979; C. L. 1913, § 5524; R. C. 1943, § 47-1010; S. L. 1957, ch. 309, § 1; 1957 Supp., § 47-1010.

Derivation: Cal. Civ. C., 1112.

Cross-References.

Covenants of warranty not broken by existence of highway right of way, exception, see § 47-04-31.

Presumption of ownership to center of street, see § 47-01-16.

Contrary Intent.

A different intent appears from a grant when the soil beneath the highway is specifically excepted from the grant. Lalim v. Williams County, 105 NW 2d 339.

Vacation by Law.

A conveyance without any reservation by the owner of a lot adjoining a street will pass title to the center of the street except in cases where the street has been vacated in the manner provided by law. Welsh v. Monson, 79 NW 2d 155.

47-10-19. Covenants implied from use of word grant. From the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for the grantor and the grantor's heirs to the grantee and the grantee's heirs and assigns, are implied unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, nor any right, title, or interest therein, to any person other than the grantee; and
2. That such estate, at the time of the execution of such conveyance, is free from encumbrances done, made, or suffered by the grantor, or any person claiming under the grantor. Such covenants may be sued upon in the same manner as if they had been inserted expressly in the conveyance.

Source: Civ. C. 1877, § 628; R.C. 1895, § 3539; R.C. 1899, § 3539; R.C. 1905, § 4976; C.L. 1913, § 5521; R.C. 1943, § 47-1019.

Derivation: Cal. Civ. C., 1113.

Cross-References.
Damages for breach of covenant against encumbrances, see § 32-03-12.
Damages for breach of covenants in grant, see § 32-03-11.

Contract for Sale.
Where the contract provided for the sale of land without specifying the kind of conveyance, it will be implied that a conveyance of the fee by deed with general warranty was intended. Hoth v. Kahler, 74 N.W.2d 440 (N.D. 1956).

Express Covenant Against Encumbrances.
The implied covenant against encumbrances raised by the use of the word "grant" in a conveyance in fee is restrained, as against the grantor, by an express covenant against encumbrances limited by its terms to the heirs, executors, and administrators of the grantor. Dun v. Dietrich, 3 N.D. 3, 53 N.W. 81 (1892).

Joinder of Wife.
A wife who joins her husband in a deed for no purpose other than to release her homestead right in the property is not bound by the implied covenant arising from the use of the word "grant". Dun v. Dietrich, 3 N.D. 3, 53 N.W. 81 (1892).

Quitclaim Deed.
A quitclaim deed is one which purports to convey, and is understood to convey, nothing more than the interest or estate in the property described of which the grantor is seized or possessed, if any, at the time, rather than the property itself. Frandson v. Casey, 73 N.W.2d 436 (N.D. 1955).

Collateral References.
Covenants ⇦ 8-14; Deeds ⇦ 92, 95.
20 Am. Jur. 2d, Covenants, Conditions, and Restrictions, §§ 29-32.
21 C.J.S. Covenants, §§ 18, 19; 26 C.J.S. Deeds, § 87.
Measure of damages for breach of covenant of quiet enjoyment in lease, 41 A.L.R.2d 1454.

47-10-20. Attornment — When unnecessary. Grants of rents, reversions, or remainders are good and effectual without attornments of the tenants, but no tenant, who before notice of the grant shall have paid rent to the grantor, must suffer any damage thereby.

Source: Civ. C. 1877, § 632; R.C. 1895, § 3543; R.C. 1899, § 3543; R.C. 1905, § 4980; C.L. 1913, § 5525; R.C. 1943, § 47-1020.

Derivation: Cal. Civ. C., 1111.

Cross-References.
Attornment to stranger void unless made with consent of landlord or in consequence of court judgment, see § 47-16-25.

Collateral References.
Landlord and Tenant ⇦ 15, 56(2), 68.
49 Am. Jur. 2d, Landlord and Tenant, § 1053.
51C C.J.S. Landlord and Tenant, § 277.

A judge or clerk of a court of record must authenticate that officer's certificate by affixing thereto the seal of the judge's or clerk's court. A mayor of a city must authenticate that officer's certificate by affixing thereto the seal of the mayor's city.

Source: Civ. C. 1877, § 666; R.C. 1895, § 3586; R.C. 1899, § 3586; R.C. 1905, § 5028; C.L. 1913, § 5582; R.C. 1943, § 47-1932.

Derivation: Cal. Civ. C., 1188 to 1194.

Cross-References.
Notary's seal, see § 44-06-04.
Penalty for acting as notary when disqualified, see § 44-06-13.

Omission of Seal.
The fact that, in recording the original instrument, the seal of the notary to the acknowledgment was accidentally omitted did not act to defeat the original instrument as evidence. Smith v. Gale, 144 U.S. 509, 12 S. Ct. 674, 36 L. Ed. 521 (1892).

Collateral References.
Acknowledgment ⇐ 32, 33.
1 Am. Jur. 2d, Acknowledgments, §§ 37-40.
1A C.J.S. Acknowledgments, §§ 64-67.

47-19-33. Who shall not execute acknowledgments and affidavits. No person heretofore or hereafter authorized by law to take or receive the proof or acknowledgment of the execution of an instrument or affidavit and to certify thereto shall take or receive such proof, acknowledgment, or affidavit or certify to the same, if that person shall be a party to such instrument, or a member of any partnership or limited liability company which shall or may be a party to such instrument, nor if the husband or wife of such person or officer shall be a party to such instrument.

Source: S.L. 1899, ch. 2, § 1; R.C. 1899, § 3593a; R.C. 1905, § 5037; C.L. 1913, § 5593; R.C. 1943, § 47-1933; 1993, ch. 54, § 106.

Cross-References.
Penalty for acting as notary when disqualified, see § 44-06-13.

Collateral References.
Acknowledgment ⇐ 20, 21.
1 Am. Jur. 2d, Acknowledgments, §§ 15-20.
1A C.J.S. Acknowledgments, §§ 39-44.
Attorney: disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 A.L.R.3d 483.

47-19-34. Proof and acknowledgment of instruments as to corporations and limited liability companies. No provision in any of the laws of this state, relating to the proof and acknowledgment of instruments and the taking of affidavits, shall be construed to invalidate or affect the proof or acknowledgment, affidavit, or the certificate thereof, of any instrument to which a corporation or limited liability company may be a party and which shall have been or may be proven, acknowledged, sworn to before, or certified to by, an officer, manager, or person authorized by law, who may be an officer, director, governor, manager, employee, stockholder, or member of such corporation or limited liability company. No person otherwise qualified or authorized by law to take and receive the proof or acknowledgment of an instrument or affidavit and to certify thereto shall be disqualified by reason of being an officer, director, employee, or stockholder of any corporation or a manager, governor, employee, or member of any limited liability company which is a party to such instrument, and such proof, acknowledgment, and certificate thereof shall be valid for all purposes.

47-19-39 showing the proof of the instrument and attached thereto entitles the instrument to record with like effect as if acknowledged.

Source: Civ. C. 1877, § 667; R. C. 1895, § 3590; R. C. 1899, § 3590; R. C. 1905, § 5032; C. L. 1913, § 5586; R. C. 1943, § 47-1940.

Derivation: Cal. Civ. C., 1202.

47-19-41. Effect of not recording—Priority of first record—Constructive notice—Limitation and validation.—Every conveyance of real estate not recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance, whether in the form of a warranty deed, or deed of bargain and sale, or deed of quitclaim and release, of the form in common use or otherwise, first is deposited with the proper officer for record and subsequently recorded, whether entitled to record or not, or as against an attachment levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance. The fact that such first deposited and recorded conveyance of such subsequent purchaser for a valuable consideration is in the form, or contains the terms, of a deed of quitclaim and release aforesaid, shall not affect the question of good faith of the subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof. This section shall be legal notice to all who claim under unrecorded instruments that prior recording of later instruments not entitled to be recorded may nullify their right, title, interest or lien, to, in or upon affected real property. No action affecting any right, title, interest or lien, to, in or upon real property shall be commenced or maintained or defense or counterclaim asserted or recognized in court on the ground that a recorded instrument was not entitled to be recorded. The record of all instruments whether or not the same were entitled to be recorded shall be deemed valid and sufficient as the legal record thereof.

Source: Civ. C. 1877, § 671; R. C. 1895, § 3594; R. C. 1899, § 3594; S. L. 1903, ch. 152, § 1; R. C. 1905, § 5038; C. L. 1913, § 5594; R. C. 1943, § 47-1941; S. L. 1959, ch. 334, §§ 1 to 4.

Derivation: Cal. Civ. C., 1214.

Cross-References.

Effect of recording, see § 47-19-19.

Failure to include grantee's address on recorded deed not to defeat doctrine of constructive notice, see § 47-19-05.

Actual Notice.

Actual notice is express information of a fact. Gress v. Evans, 1 Dak 387 [371], 46 NW 1132.

Proof of circumstances, short of actual notice, which should put a prudent man upon inquiry, authorizes the court, or jury, to infer and find actual notice. Gress v. Evans, 1 Dak 387 [371], 46 NW 1132.

Bankruptcy.

The mere failure to record an instrument given prior to the four-month period preceding bankruptcy, and its later recordation within the four-month period, does not result in a "preference" within the contemplation of section 60a of the National Bankruptcy Act. Hart v. Weiser, 57 ND 849, 224 NW 308, following 57 ND 634, 225 NW 78.

47-19-44. Requisites of instrument to revoke power to convey. No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation also is acknowledged or proved, certified, and recorded in the same office in which the instrument containing the power was recorded.

Source: Civ. C. 1877, § 673; R.C. 1895, § 3596; R.C. 1899, § 3596; R.C. 1905, § 5040; C.L. 1913, § 5596; R.C. 1943, § 47-1944.

Derivation: Cal. Civ. C., 1216.

Revocation by Death.
A power of attorney, though irrevocable during the life of a party, is extinguished by his death unless it is coupled with an interest. Brown v. Skotland, 12 N.D. 445, 97 N.W. 543 (1903).

47-19-45. Record — Constructive notice of execution — Instruments recorded admissible in evidence without further proof. The depositing with the proper officer for record of any instrument shall be constructive notice of the execution of such instrument to all purchasers and encumbrancers subsequent to such depositing, if such instrument is subsequently recorded. All instruments entitled to record, the record of all instruments, or a duly certified copy of such record, shall be admissible in evidence in all the courts of this state and may be read in evidence in all of the courts of this state without further proof.

Source: Civ. C. 1877, § 674; R.C. 1895, § 3597; R.C. 1899, § 3597; S.L. 1901, ch. 145, § 1; R.C. 1905, § 5041; C.L. 1913, § 5597; R.C. 1943, § 47-1945; S.L. 1959, ch. 335, § 1.

Cross-References.
Failure to include grantee's address on recorded deed not to defeat doctrine of constructive notice, see § 47-19-05.

Constructive Notice.
One dealing with respect to real property is charged with notice of properly recorded instruments affecting the title thereto. Northwestern Mut. Sav. & Loan Ass'n v. Hanson, 72 N.D. 629, 10 N.W.2d 599 (1943).

An instrument gives only constructive notice of its contents when deposited in the office of the register of deeds, and when recorded the record relates back to the date of deposit and as of that time is constructive notice of the contents actually and correctly recorded. Northwestern Imp. Co. v. Norris, 74 N.W.2d 497 (N.D. 1955); Northern Pac. Ry. v. Advance Realty Co., 78 N.W.2d 705 (N.D. 1956).

Instrument that is erroneously indexed under wrong description in tract index does not give constructive notice; prospective purchaser or encumbrancer has no duty, insofar as constructive notice is concerned, to consult reception book or grantor-grantee indexes other than to determine if there are unrecorded and unindexed instruments in hands of register of deeds; consequence of failure to correctly index a mortgage in tract index falls upon mortgagee rather than subsequent purchaser or encumbrancer. Hanson v. Zoller, 187 N.W.2d 47 (N.D. 1971).

Cotenants.
Cotenant's recording of oil and gas leases in which he was the only lessor, an affidavit stating that he was sole and only owner, and a contract for deed for the entire property in which he was the only grantor constituted only constructive notice of his ouster of the other cotenants and was not sufficient notice to establish a hostile ouster for purposes of establishing title by adverse possession against his other cotenants; this section does not imply that constructive notice of one cotenant's claimed interest is chargeable to the other cotenants. Nelson v. Christianson, 343 N.W.2d 375 (N.D. 1984).

Definitions.
The verb "record" as used in this statute means to transcribe or copy the instrument deposited with the register of deeds so that a copy of the instrument is made a part of the permanent records of the office. Northwestern Imp. Co. v. Norris, 74 N.W.2d 497 (N.D. 1955).

"Recorded" means transcribed in some permanent book, and a mere deposit of the in-

strument with the recorder is not sufficient. Northwestern Imp. Co. v. Norris, 74 N.W.2d 497 (N.D. 1955).

Insufficient Complaint.
An allegation of the dates of recording deeds is not sufficient where the deeds themselves are not sufficiently pleaded. Nation v. Cameron, 2 Dak. 347, 11 N.W. 525 (1880).

Introduction of Copy.
This section permits the introduction in evidence of the record of a contract which has been recorded without accounting for the nonproduction of the original. Farmers' Equity Exch. v. Blum, 39 N.D. 86, 166 N.W. 822 (1918).

Purpose of Statute.
The primary purpose of the recording statutes is to give notice of and to protect rights, as against subsequent purchasers or encumbrancers, not to create rights not possessed, either of record or in fact. Westgard v. Farstad Oil, Inc., 437 N.W.2d 522 (N.D. 1989).

Recording of a Subsequent Mortgage.
Where a bank was not a subsequent purchaser but held a prior mortgage, a third party's recording of its subsequent mortgage did not constitute notice to the bank of its contents, because the recording of a mortgage is not notice to a prior purchaser. Westgard v. Farstad Oil, Inc., 437 N.W.2d 522 (N.D. 1989).

Collateral References.
Records ⇐ 1-7, 19, 20.
66 Am. Jur. 2d, Records and Recording Laws, §§ 102-155.
76 C.J.S. Records, §§ 30, 31.

Record of instrument which comprises includes an interest or right that is not proper subject of record, 3 A.L.R.2d 577.

Grantee from whose deed restrictive covenant, imposed by general plan of subdivision has been omitted, 4 A.L.R.2d 1368.

Timber: rights as between purchaser of timber under recorded instrument and subsequent vendee of land, 18 A.L.R.2d 1162.

Relative rights to real property as between purchasers from or through decedent's heirs as devisees under will subsequently sought to be established, 22 A.L.R.2d 1107.

Personal covenant in recorded deed as enforceable against grantee's lessee or successor, 23 A.L.R.2d 520.

What acts, claims, circumstances, instruments, color of title, judgment, or thing of record will ground adverse possession in a life tenant as against remaindermen or reversioners, 58 A.L.R.2d 299.

Acknowledgment: record of instrument without sufficient acknowledgment as notice, 59 A.L.R.2d 1299.

Reformation of instruments, record of instrument incorrectly describing property as notice of intended contents affecting right to, 79 A.L.R.2d 1202.

Reformation of instrument as against third persons, record of incorrect instrument as notice of intended contents, 79 A.L.R.2d 1202.

Fraudulent conveyance, registration as notice to creditor of, which will start running of limitations, 100 A.L.R.2d 1094.

Law Reviews.
Five Steps Toward Sounder Record Title, 32 N.D. L. Rev. 223 (1956).

47-19-46. Unrecorded instrument valid between parties — Knowledge of instruments out of chain of title. An unrecorded instrument is valid as between the parties thereto and those who have notice thereof. Knowledge of the record of an instrument out of the chain of title does not constitute such notice, provided, however, that the record of a mortgage, deed, or other conveyance prior to the recording of a deed or other conveyance vesting title of record in the mortgagor or grantor shall not be considered out of the chain of title after the recording of a deed or other conveyance vesting title in the mortgagor or grantor in such first recorded mortgage, deed, or other conveyance.

Source: Civ. C. 1877, § 675; R.C. 1895, § 3598; S.L. 1899, ch. 167, § 1; R.C. 1899, § 3598; R.C. 1905, § 5042; C.L. 1913, § 5598; R.C. 1943, § 47-1946; S.L. 1957, ch. 313, § 1; 1957 Supp., § 47-1946.

Derivation: Cal. Civ. C., 1217.

Actual Notice.
One who had knowledge of facts sufficient to put a prudent man on inquiry with regard to the existence of an unrecorded deed, and failed to make such inquiry, could not claim protection under the recording act; buyer's knowledge, before his tender of purchase

Coordinated by the State Bar Association of North Dakota *and the* University of Mary's Division of Continuing Education

The People's Law School

A Course on How Our Legal System Works

are names given to deeds signed by those persons in which they convey the interest of the estate, trust or ward, with or without a warranty of title.

In terms of the buyer receiving title to real property, the buyer takes title in his own name. If there are two buyers, which is typical in North Dakota for home purchases, the buyers can take title as tenants in common or as joint tenants. When they take title as joint tenants, it is typically as "joint tenants with right of survivorship, and not as tenants in common." This means that when one joint tenant dies, upon the filing of a death certificate with the description typed on the back of it, the surviving joint tenant becomes the sole owner of the real property without any court order as to the deceased joint tenant's interest. "Tenants in common," means that both parties have an undivided one-half interest in the entire tract of real property. When a tenant in common dies, that person's interest does not automatically go to the surviving tenant in common. The surviving tenant in common, however, could receive the interest of the deceased tenant in common through the deceased person's will or through intestate succession, if the person does not have a will.

Another somewhat common form of ownership is a "life estate," in which the seller transfers the title to the buyer while reserving the right to use the real property the rest of the seller's life. Upon the death of the life tenant, the recording of a death certificate with the real property description typed on it will clear the title to the real property into the name of the person to whom it was conveyed subject to the life estate.

What do we do with a deed?

In North Dakota there is an Office of the Register of Deeds, which is the official place for recording instruments affecting the title to real property to give official public notice to the contents of the documents recorded there. **When you get a deed, record it!** North Dakota is a "race-notice" state. That means the first person to record a deed (or other instruments) gets priority ahead of any deeds or documents recorded later. For instance, what happens if a seller gives two separate deeds to two separate persons who take the deeds without notice to one another? The first person who records their deed gets the title the seller had to convey, even if the other person got their deed first, but recorded it after the person who got the second deed. The person who got the deed recorded second has an action against the seller for the purchase price paid, but that person doesn't get title to the real property.

What is an abstract of title?

The Office of the Register of Deeds in each county is the one central official place for recording all documents affecting title to real property, except judgments, which are in the Office of the Clerk of Court. A search of the records in the Office of the Register of

Original

NOTICE OF UNIFORM DURABLE POWER OF ATTORNEY

STATE OF NORTH DAKOTA)
) **ss**
COUNTY OF BURLEIGH)

I, Rebecca Carol Graves, pursuant to the provisions of North Dakota Century Code, 30 . 1-30 (5-501) does here bring forth this Notice of My granting a Uniform Durable Power of Attorney to Larry Young, with an address of RR2 Box 17, Baldwin, County of Burleigh, State of North Dakota, and do state as follows:

1. I, Rebecca Carol Graves, am an adult, a resident of the State of North Dakota, and am fully knowledgeable of and qualified to attest to the facts contained herein;

2. This Uniform Durable Power of Attorney is intended to have the effect that Larry Young, shall take in my stead the place of Rebecca Graves, and my place in all matters related to real property described as follows:

> The Southwest Quarter of the Northwest Quarter of the Southwest Quarter (SW1/4NW1/4SW1/4) of Section 15, Township 140 North, Range 80 West of the 5th Principal Meridian, (10 acres) all located in Burleigh County,North Dakota
>
> The Northwest Quarter of the Southwest Quarter (NW1/4SW1/4) Less the Southwest Quarter of the Northwest Quarter of the Southwest Quarter (SW1/4NW1/4SW1/4) of Section Fifteen (15), Township 140 North, Range 80 West of the 5th Principal Meridian. (30 acres more or less) all located in Burleigh County, North Dakota.

3. Larry Young's duties shall be limited to the preservation, maintenance and care to the right title and interest of the above mentioned real property.

4. This uniform durable power of attorney becomes effective upon the date of execution and shall remain effective until revoked by Rebecca Carol Graves.

Dated this 4th day of January, 2001.

Rebecca C. Graves

Rebecca C. Graves, Grantor
UNIFORM DURABLE POWER OF ATTORNEY (IN FACT)
1111 Park Drive, Apt A
Grand Forks, ND 58201

After being subscribed, sworn, and sealed, the person acknowledging appeared before me and acknowledged that the person executed the instrument.

Rebecca Sharff

Notary Public
County of Burleigh, State of North Dakota
My commission expires 6-11-2004

REBECCA SHARFF
Notary Public. STATE OF NORTH DAKOTA
My Commission Expires JUNE 11, 2004